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Sentence

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

12 Cr. 0423 (AJN)

6 MINH QUANG PHAM,

7 Defendant.
-----x

8 New York, N.Y.
9 May 16, 2016
10 2:05 p.m.

11 Before:

12 HON. ALISON J. NATHAN,

13 District Judge

14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the
Southern District of New York

17 SEAN S. BUCKLEY

18 ANNA SKOTKO

SHANE T. STANSBURY

19 Assistant United States Attorneys

20 LAW OFFICES OF BOBBI C. STERNHEIM

Attorneys for Defendant

BOBBI C. STERNHEIM

21 - also present -

22 SA Brian Czekala

23 SA Julius Nutter, Federal Bureau of Investigation

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1 THE CLERK: U.S. v. Minh Quang Pham.

2 Parties, please state your name for the record,
3 starting with the government.

4 MS. SKOTKO: Good afternoon, your Honor. Anna Skotko,
5 Sean Buckley and Shane Stansbury for the government, and with
6 us at counsel table are FBI Special Agents Julius Nutter and
7 Brian Czekala.

8 THE COURT: Good afternoon to all of you.

9 For the defendant.

10 MS. STERNHEIM: Good afternoon, your Honor. Bobbi
11 Sternheim for Minh Quang Pham, who is seated at counsel table.

12 THE COURT: Good afternoon, Ms. Sternheim, and good
13 afternoon, Mr. Pham.

14 I'll repeat. Good afternoon to everyone.

15 MS. STERNHEIM: Good afternoon.

16 THE COURT: Right. We are here today for sentencing
17 in United States v. Pham. In preparation for today's
18 proceeding, I have reviewed the probation report, which is
19 dated March 31, 2016. I've also received and reviewed the
20 following additional submissions:

21 I have the defendant's submission, which is dated
22 April 22, 2016. Attached to it are Exhibits A through L, and
23 just to state what each of those are: Exhibit A is a personal
24 statement from Mr. Pham to the Court. B is statement from
25 Mr. Pham explaining his post-arrest interviews and statements.

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1 C through K are letters from friends and family members and a
2 former student. L is a forensic psychological evaluation. In
3 addition to those exhibits, I have watched the video statements
4 of friends and relatives submitted on Mr. Pham's behalf.

5 I have the government's submission, which is dated
6 April 29, 2016. It has attached as exhibits the following:

7 Exhibit 1A through D, are statements made by Mr. Pham.
8 Exhibit 2 is materials from Inspire. Exhibit 3 is an email
9 from Mr. Pham to his wife. Exhibits 4A and B are notes and
10 transcript from his interviews in the U.K. in July of 2011.
11 Exhibit 5 is photographs of cash seized from Mr. Pham upon his
12 return to the U.K. Exhibit 6 is a photograph of a live
13 ammunition round that was found on Mr. Pham upon his return to
14 Heathrow Airport in 2011. Exhibit 7 is a U.K. forensic report
15 related to searches of Mr. Farm's electronic media that were
16 seized upon his arrest in the U.K. Exhibit 8 is printouts of
17 an IM chat that Mr. Pham had after his return to London.
18 Exhibit 9 is a summary chart of convictions and sentences cited
19 in the defense submission. And Exhibit 10 is a CD that
20 contains underlying judgments and related documents for cases
21 cited in the defense submission, that is to say, the cases
22 summarized in the Government's Exhibit 9. As my chambers
23 communicated with counsel, I was unable to access these
24 materials until this morning when the government provided a
25 password but I was able to access them after that.

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I have the defendant's reply submission, which is dated May 2, 2016, and I have the government's surreply, dated May 11, 2016, which has an Exhibit 11 attached, and that is a sworn statement of a cooperating witness.

Counsel, is there anything else I should have in front of me for purposes of sentencing?

MS. SKOTKO: Nothing from the government, your Honor.

MS. STERNHEIM: None from the defense. Thank you.

THE COURT: And could you confirm that you each received each other's submissions and were able to access all of the materials?

MS. STERNHEIM: I was able to, your Honor.

MS. SKOTKO: Yes, your Honor.

THE COURT: All right. Thank you.

All right. Turning to the presentence report.

Ms. Sternheim, I know that you have, but for the record, can you confirm that you have read the presentence report and discussed it with your client?

MS. STERNHEIM: Yes. I confirm that.

THE COURT: And, Mr. Pham, I want to make sure that you had an opportunity to review the presentence report and go over it with Ms. Sternheim and if there were any errors, an opportunity to raise them with her. Did you have that opportunity?

THE DEFENDANT: I had.

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1 THE COURT: Thank you.

2 And, Ms. Skotko, can you please confirm that you have
3 reviewed the presentence report?

4 MS. SKOTKO: Yes, your Honor. The government has
5 reviewed the presentence report and we have no objections.

6 THE COURT: All right. Then I'll put the question as
7 well to Ms. Sternheim. Putting aside the calculation of the
8 Sentencing Guidelines for a moment, are there any objections to
9 the report regarding factual accuracy?

10 MS. STERNHEIM: None other than what I put in my reply
11 concerning statements made by the cooperating witness which we
12 believe have some factual basis but are exaggerated.

13 THE COURT: All right. Well --

14 MS. STERNHEIM: And, Judge, I would just add, I'm not
15 contesting their relationship to the sentence to be imposed.
16 The substance of the counts to which Mr. Pham has pled guilty
17 are independent of those statements. It is just a matter of
18 accuracy.

19 THE COURT: OK. Well, I actually think we should just
20 get to this point, then, because to me it is significant, which
21 is that there is a factual dispute contained in the written
22 submissions and it appears to me significant because it is from
23 the perspective of each side on this factual issue that the
24 ultimate sentencing arguments are made, with the government
25 advocating based on its factual assertions that Mr. Pham should

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1 be sentenced to 50 years and the defense, based on its
2 rejection and counter-assertions of this factual question, that
3 Mr. Pham should be sentenced to no more than 30 years.

4 And just to state what I understand to be the factual
5 dispute, the government says that Mr. Pham volunteered to
6 return to the U.K. and to recruit individuals to AQAP and to
7 martyr himself by carrying out a suicide bombing at Heathrow
8 Airport that would target either American or Israeli civilians.
9 The government says that Mr. Pham took affirmative steps to
10 carry this out, including receiving bomb-making training and
11 specific instructions, and argues that it was likely Mr. Pham's
12 detention and then arrest in the U.K. that interrupted his
13 plans.

14 As I read the defense submissions, a very different
15 factual contention is asserted. It is claimed that he became
16 disillusioned with AQAP before he departed Yemen and that he
17 left the organization in July of 2011, that he made statements
18 to al-Aulaqi about carrying out violence in the U.K. only so
19 that he would be permitted to leave Yemen or return to his
20 family, and that he never had any intention of carrying out
21 violence.

22 And my question is isn't this a factual dispute that
23 needs to be resolved for purposes of sentencing?

24 MS. STERNHEIM: It certainly is a factual dispute.
25 When I was speaking before, I was speaking with regard to the

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1 confidential source, who I don't think has tremendous bearing
2 on this issue, but this issue is a major issue. Yes, it is.

3 THE COURT: No side has indicated, but let me confirm
4 if either side is seeking a Fatico hearing for purposes of
5 resolution of that factual issue?

6 MS. STERNHEIM: We are not.

7 MS. SKOTKO: Your Honor, the government does not.

8 THE COURT: All right. I had assumed that from the
9 submissions but I do -- and have I articulated the factual
10 dispute correctly from each side's perspective?

11 MS. STERNHEIM: Yes, your Honor. And I would just
12 note that that is a factual dispute that really comes after the
13 conduct that formed the basis of the plea. I know that this
14 matter was tangentially raised at the time of the plea and I
15 indicated that I would address it as I have. But suffice it to
16 say no violent activity was engaged in by Mr. Pham, and he
17 certainly was at liberty for a six-month period, from July of
18 2011, when he returned from Yemen, until the time of his arrest
19 by British authorities in December of 2011, and after that is
20 when his extradition was sought. But there were no steps taken
21 to support his alleged intention to commit any violence
22 whatsoever, and we maintain that position.

23 THE COURT: All right. I gather this will be taken up
24 again, but just as a procedural matter, I think I have clarity
25 but I also want to just state that -- and you could make the

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1 arguments that you like from the record before me, but I'll
2 tell you that my inclination based on the materials before me
3 is to accept the government's version of the facts, and so I do
4 want to confirm finally that it is not the defense's request to
5 seek any kind of evidentiary hearing in furtherance of the
6 arguments made as to the factual dispute.

7 MS. STERNHEIM: May I confer with Mr. Pham?

8 THE COURT: Please.

9 (Pause)

10 THE COURT: Ms. Sternheim, I don't want you to feel
11 rushed in any way. I would be happy to step down to give you
12 some time to confer with Mr. Pham or I'm happy to wait here,
13 too.

14 MS. STERNHEIM: I certainly don't want to belabor
15 this, but I would like to explain the circumstances and the
16 consequences of that to Mr. Pham as it was not something we
17 were pursuing. So if the Court could give us five minutes?

18 THE COURT: I'm happy to do that. I will step down,
19 and give an indication to Ms. Nunez when you are ready to
20 proceed.

21 MS. STERNHEIM: I will.

22 THE COURT: Thank you.

23 THE CLERK: All rise.

24 (Recess)

25 THE COURT: Ms. Sternheim.

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1 MS. STERNHEIM: Yes, Judge. I'm not convinced that
2 Mr. Pham completely understands either the procedure or the
3 ramifications of going forward, and in light of that I would
4 like an opportunity for me to confer with him about that. So,
5 I would ask that we not go forward today --

6 THE COURT: OK.

7 MS. STERNHEIM: -- in light of that, because he is
8 firm -- we are firm in the position that we stated. And if the
9 Court is basing sentence in part on that, I think that is an
10 issue that needs to be resolved and I would like an opportunity
11 to explore this with him, perhaps confer with the government,
12 and then alert your Honor if in fact we are going to request a
13 hearing.

14 THE COURT: All right. Ms. Skotko.

15 MS. SKOTKO: Yes, your Honor.

16 It is the government's position that we have met our
17 burden with respect to the evidence at sentencing of both the
18 CW's statements and the plot once the defendant returned to the
19 U.K. by more than a preponderance of the evidence. At this
20 point, if the defense does choose to request a Fatico hearing,
21 it is our position that the burden would be on the defendant
22 because he has not put forward any evidence to undermine the
23 evidence submitted by the government, and so it would be his
24 burden to either take the stand and put forward a contrary
25 story or put forward other witnesses.

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1 THE COURT: Ms. Sternheim, do you want to respond to
2 that as a preliminary matter?

3 MS. STERNHEIM: Yes, I would.

4 With regard to the conduct, I think the fact that for
5 six months there was no action taken towards this plot that the
6 government feels it has met its burden on is powerful evidence,
7 and --

8 THE COURT: May I ask a record question based on that
9 and then a reasonable inference question?

10 So the record question is: Didn't Mr. Pham -- isn't
11 there evidence in the record to suggest that Mr. Pham knew he
12 was being -- he had been questioned, he thought, on the basis
13 of suspicion of terrorism when he was originally detained in
14 the U.K. upon his return from Yemen, and is it a reasonable
15 inference that he, in light of that, either assumed -- assumed,
16 rightly or wrongly, that he was under surveillance or
17 investigation for terrorism, which means that the value of that
18 six months of nonaction has diminished significance?

19 MS. STERNHEIM: I would take issue with that, Judge.
20 The fact that the matter is -- if one were to analyze this
21 along the lines of someone who is willing to martyr himself, it
22 could be done. I don't think that surveillance alone would
23 stop it. We have no indication that he was on 24-hour
24 surveillance. He led his life. He came and went. He did
25 nothing to indicate that he was going to do what the government

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1 believes he was going to do.

2 And certainly if he was headstrong on doing something
3 terrible, which I only bring up for purposes of argument, when
4 al-Aulaqi was killed by a drone, someone who would be so devout
5 would have acted, perhaps, as a loan wolf at that point and
6 nothing happened. Now, certainly if the Court wishes to accept
7 the fact that he may have been under surveillance and that's
8 why he didn't do it, I don't think there is anything to support
9 that, and I can't put forth witnesses to say otherwise. But
10 this is a man who came and went for a six-month period and
11 engaged in no violent activity.

12 And I would just also add, while we're talking about
13 his coming into the United States, he was stopped, searched --

14 THE COURT: Into the U.K.

15 MS. STERNHEIM: Into the U.K., excuse me.

16 -- en route from Yemen in Bahrain. Everything was
17 taken from him. Everything was given back to him.

18 So he entered the U.K. Yes, the bullet became an
19 issue but he was released, and nothing came of it until that
20 time when he was arrested in December.

21 So we are aware of nothing to support anything to
22 confirm an inference that could be drawn from the Court's
23 suggestion that because he knew he had been stopped. And when
24 he was stopped, they let him go and nothing happened. And then
25 he was detained.

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1 He was later arrested in connection with these
2 charges. He was put in general population in the U.K. There
3 wasn't concerns about him being a terrorist later on here, and
4 then he was extradited to the United States.

5 But he has been firm from the first day that I met him
6 with regard to the fact that it was never his intention to
7 commit any violence and certainly not to commit any violence
8 upon return to the U.K.

9 THE COURT: All right. Anything further, Ms. Skotko,
10 before we adjourn on the understanding that Ms. Sternheim
11 requests more time to consult Mr. Pham and make sure he's aware
12 of his rights and the decision regarding potentially seeking a
13 Fatico hearing?

14 MS. SKOTKO: Yes, your Honor.

15 First of all, the government categorically disputes
16 Ms. Sternheim's rendition of the facts. For a period of time,
17 from July 2011 through his arrest in December of 2011, not only
18 the actions but also the statements of Mr. Pham show that he
19 knew he was under surveillance. He told the FBI that he
20 understood that there were communications between the
21 government, where he was first stopped and searched, and the
22 U.K. authorities, and so he expected to be stopped when he got
23 on the plane. He expected to be searched and questioned, which
24 he was. So he understood that the U.K. authorities were aware
25 of his travels and incidents related thereto.

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1 He then also tells FBI that he contacts -- after
2 returning to the U.K. he contacts al-Aulaqi using essentially a
3 burner phone, an old cell phone in which he inserted a new SIM
4 card just for the purpose of calling the number that al-Aulaqi
5 had given him to call him after he was back in the U.K. to
6 signal to AQAP that he was safe and he was still on track with
7 his mission.

8 He also has the chats, that your Honor referenced in
9 one of our exhibits, describing his positive experience in
10 Yemen, and his statements to the CW saying that he wanted to
11 martyr himself, that jihad was more important than family, that
12 he had no desire to return home.

13 All of these things, among others, which the
14 government would show at a hearing if necessary, show that he,
15 far from withdrawing from AQAP, far from showing any remorse or
16 reform, his efforts once he got back to the U.K. were to
17 continue his mission and to continue the agenda of AQAP.

18 With that said, I would like to request that if we are
19 going to take an adjournment, perhaps we could try to set a
20 later time this afternoon to see whether the defendant has
21 reached a decision as to whether to proceed. Any time today
22 the government is available and then, if not, we can adjourn
23 for a later date, but while we are all here today, perhaps we
24 can do it and continue moving forward.

25 THE COURT: Ms. Sternheim.

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1 MS. STERNHEIM: Your Honor, I would not be prepared to
2 make a decision today, and as the Court may know, I have a
3 very, very tight schedule. So this is going to have to be put
4 off for a while. I have one more day in New York and then I
5 will be in the Western District of New York for the summer on
6 trial.

7 THE COURT: When would you propose an adjournment for?

8 MS. STERNHEIM: August. I have been required by Judge
9 Geraci, the Chief Judge, to be committed until August 12th. I
10 am optimistic that it will be over before then, but in light of
11 his direction, I am just reporting that to the Court. But
12 certainly I would be prepared beforehand. And, your Honor, if
13 for some reason I can in short matter resolve this and indicate
14 that we are not going forward, I can tell you when I will be in
15 New York, if that makes a difference to the Court.

16 THE COURT: Well, let me make one suggestion. Since
17 you are here, Mr. Pham is here, that, assuming that you arrange
18 it with the marshals, that you just have some time now to meet
19 and discuss with him. If you were to indicate that based on
20 that you are ready to go forward today, we could do it and, if
21 not, not. I mean in no way to pressure that decision one way
22 or the other but just to give the opportunity to speak to him
23 now since you have time allotted now and he's here and you're
24 here.

25 MS. STERNHEIM: Yes, I understand that, your Honor,

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1 but I do need to confer with other parts of his legal team, and
2 I'm not sure that I would be able to reach them as of now. I
3 would endeavor to do that and perhaps be in a position to give
4 a yea or a nay but I would not be able to do that today.

5 THE COURT: All right. So your proposal is to adjourn
6 and you're going to tell me potential dates that you are
7 available?

8 MS. STERNHEIM: Yes.

9 THE COURT: Go ahead.

10 MS. STERNHEIM: The two days that I would be available
11 would be the 27th of May and the 31st of May. Other than that,
12 it would have to be August.

13 THE COURT: I can do either of those.

14 Ms. Skotko.

15 MS. SKOTKO: Your Honor, I also believe defense
16 counsel said she was available tomorrow before she goes back to
17 the Western District of New York, so perhaps a day's
18 adjournment might give her an opportunity to consult with other
19 members of the defense team. We could schedule something for
20 tomorrow and then, as well, something --

21 MS. STERNHEIM: I am not available tomorrow. I leave
22 at 7:30 in the morning for the Western District of New York. I
23 will not be back in New York until the evening of the 26th of
24 May.

25 MS. SKOTKO: My apologies. I misunderstood.

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1 THE COURT: All right. Why don't we say May 27th. I
2 can do after 11:30 a.m.

3 MS. STERNHEIM: Whatever time is good for the Court.

4 THE COURT: Why don't we say noon.

5 MS. STERNHEIM: Thank you.

6 THE COURT: And let me just state, the reason that I
7 fronted this issue was just after spending a lot of time in the
8 submissions and making notes to myself at every point and which
9 resolution of this factual dispute seemed to emerge as an
10 issue, it seemed to go to most arguments being made by both
11 sides. It's in the government's arguments for the nature and
12 seriousness of the offense, specific deterrence, arguments for
13 protecting the public. It goes to arguments the defense makes
14 around minimal participation, exceptional acceptance of
15 responsibility, the appropriateness of the guidelines, criminal
16 history enhancement for terrorism cases, as well as the cases
17 both sides point to as appropriate comparators for avoiding
18 unwarranted sentence disparities. Now, what you've done today
19 in part is to make arguments from the existing record as to
20 what I should conclude based on that, and maybe that's all
21 that's being asked. But I did want to, by noting how I
22 understood the arguments to play into each of the contentions
23 being made and given my inclination toward a finding in favor
24 of the government on the point based on the record before me, I
25 wanted a full opportunity for Mr. Pham to consider whether a

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1 Fatico hearing is being sought or whether it is simply a
2 request to make the kinds of arguments that Mr. Sternheim was
3 making today from the existing record.

4 I think the only other issue which I don't have
5 resolution, but I did want to give Ms. Sternheim an opportunity
6 for you to address if you want to now, is the burden question.
7 If we were to have a hearing, Ms. Skotko has indicated the
8 government's view that in light of the showing that they've
9 made to overcome what's been put in front of me from the
10 government would require affirmative evidence from the defense.

11 Do you have a response to that, indication or is that
12 something you would like to consider?

13 MS. STERNHEIM: I would like an opportunity to
14 consider that because, in essence, I'm being asked to prove a
15 negative, and I'm not sure how that factors in with the burden.
16 If my position is he didn't do anything and my burden is to
17 establish that he didn't do anything --

18 THE COURT: Well, it's been established that he didn't
19 do anything; right?

20 MS. STERNHEIM: So I have --

21 THE COURT: That is to say, he did not engage in acts
22 of violence.

23 MS. STERNHEIM: I then have to figure out, one, if in
24 fact it is my burden and whether I am able to overcome that. I
25 certainly don't want to waste anybody's time if I can make an

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1 assessment that I'm not going to be able to, and certainly I
2 have to look toward what evidence I would put forward.

3 THE COURT: Understood.

4 MS. STERNHEIM: Thank you.

5 THE COURT: Anything else, counsel?

6 MS. SKOTKO: Yes, your Honor.

7 The government would just request clarification of the
8 schedule. Would it be possible for defense counsel to notify
9 us by perhaps Thursday -- by us and the Court by Thursday this
10 week as to whether or not the defendant is in fact requesting a
11 Fatico hearing? And, if so, would that hearing be held on the
12 27th, or would that be for a further conference to discuss?

13 THE COURT: Excellent questions.

14 Ms. Sternheim.

15 MS. STERNHEIM: Well, to the extent I have completed
16 what I need to do in light of the other matters that I have to
17 deal with, I certainly would want to inform the government as
18 quickly as possible and I will endeavor to do that, but I ask
19 not to be held to that because I don't know if I'll be able to
20 accomplish it, but certainly that would be my best effort.

21 THE COURT: So you'll make your best effort to inform
22 the government and the Court by the end of this week?

23 MS. STERNHEIM: Yes.

24 THE COURT: If the informed decision is not to proceed
25 by evidentiary hearing, we'll proceed to sentencing I presume

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1 on May 27th?

2 MS. STERNHEIM: Yes.

3 THE COURT: If the decision is to proceed to
4 evidentiary hearing, I'll ask defense and the government to
5 confer as to whether we can proceed to that hearing on the
6 27th. All right?

7 MS. STERNHEIM: Yes. Are you asking us now? I
8 mean --

9 THE COURT: No. That's what I'll expect to hear from
10 the parties.

11 MS. STERNHEIM: Certainly. I mean, my position would
12 be if whatever evidence or witnesses I need are available, I
13 would request that we do it on that day.

14 THE COURT: OK. All right. Anything else?

15 MS. SKOTKO: Nothing from the government. Thank you,
16 your Honor.

17 THE COURT: All right. Thank you.

18 MS. STERNHEIM: Thank you.

19 THE COURT: We are adjourned.

20 THE CLERK: All rise.

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